

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

I. (a) PLAINTIFFS

BARRY GILBERT

DEFENDANTS

MDK MOTORSPORTS, LLC, a California Limited Liability Corporation; MARK KVAMME, an individual

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Michael D. Bruno (SBN: 166805)

Gordon & Rees LLP

275 Battery Street, Suite 2000

San Francisco, CA 94111

Telephone: (415) 986-5900

Attorneys (If Known)

MS95BZ

II. BASIS OF JURISDICTION

(Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT

(Place an "X" in One Box Only)

| CONTRACT | TORTS | | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES |
|---|--|---|--|--|--|
| <input type="checkbox"/> 110 Insurance | <input type="checkbox"/> 310 Airplane | <input type="checkbox"/> 362 Personal Injury — Med. Malpractice | <input type="checkbox"/> 610 Agriculture | <input type="checkbox"/> 422 Appeal 28 USC 158 | <input type="checkbox"/> 400 State Reapportionment |
| <input type="checkbox"/> 120 Marine | <input type="checkbox"/> 315 Airplane Product Liability | <input type="checkbox"/> 365 Personal Injury — Product Liability | <input type="checkbox"/> 620 Other Food & Drug | <input type="checkbox"/> 423 Withdrawal 28 USC 157 | <input type="checkbox"/> 410 Antitrust |
| <input type="checkbox"/> 130 Miller Act | <input type="checkbox"/> 320 Assault, Libel & Slander | <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 | PROPERTY RIGHTS | <input type="checkbox"/> 430 Banks and Banking |
| <input type="checkbox"/> 140 Negotiable Instrument | <input type="checkbox"/> 330 Federal Employers' Liability | PERSONAL PROPERTY | <input type="checkbox"/> 630 Liquor Laws | <input type="checkbox"/> 820 Copyrights | <input type="checkbox"/> 450 Commerce |
| <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment | <input type="checkbox"/> 340 Marine | <input type="checkbox"/> 370 Other Fraud | <input type="checkbox"/> 640 R.R. & Truck | <input type="checkbox"/> 830 Patent | <input type="checkbox"/> 460 Deportation |
| <input type="checkbox"/> 151 Medicare Act | <input type="checkbox"/> 345 Marine Product Liability | <input type="checkbox"/> 371 Truth in Lending | <input type="checkbox"/> 650 Airline Regs. | <input type="checkbox"/> 840 Trademark | <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations |
| <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) | <input type="checkbox"/> 350 Motor Vehicle | <input type="checkbox"/> 380 Other Personal Property Damage | <input type="checkbox"/> 660 Occupational Safety/Health | SOCIAL SECURITY | <input type="checkbox"/> 480 Consumer Credit |
| <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits | <input type="checkbox"/> 355 Motor Vehicle Product Liability | <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 690 Other | <input type="checkbox"/> 861 HIA (1395ff) | <input type="checkbox"/> 490 Cable/Sat TV |
| <input type="checkbox"/> 160 Stockholders' Suits | <input type="checkbox"/> 360 Other Personal Injury | | LABOR | <input type="checkbox"/> 862 Black Lung (923) | <input type="checkbox"/> 810 Selective Service |
| <input type="checkbox"/> 190 Other Contract | | | <input type="checkbox"/> 710 Fair Labor Standards Act | <input type="checkbox"/> 863 DIWC/DIWW (405(g)) | <input type="checkbox"/> 850 Securities/Commodities/Exchange |
| <input type="checkbox"/> 195 Contract Product Liability | | | <input type="checkbox"/> 720 Labor/Mgmt. Relations | <input type="checkbox"/> 864 SSID Title XVI | <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 |
| <input type="checkbox"/> 196 Franchise | | | <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act | <input type="checkbox"/> 865 RSI (405(g)) | <input type="checkbox"/> 890 Other Statutory Actions |
| | | | <input type="checkbox"/> 740 Railway Labor Act | FEDERAL TAX SUITS | <input type="checkbox"/> 891 Agricultural Acts |
| REAL PROPERTY | CIVIL RIGHTS | PRISONER PETITIONS | <input type="checkbox"/> 790 Other Labor Litigation | <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) | <input type="checkbox"/> 892 Economic Stabilization Act |
| <input type="checkbox"/> 210 Land Condemnation | <input type="checkbox"/> 441 Voting | <input type="checkbox"/> 510 Motions to Vacate Sentence | <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act | <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 893 Environmental Matters |
| <input type="checkbox"/> 220 Foreclosure | <input checked="" type="checkbox"/> 442 Employment | Habeas Corpus: | IMMIGRATION | | <input type="checkbox"/> 894 Energy Allocation Act |
| <input type="checkbox"/> 230 Rent Lease & Ejectment | <input type="checkbox"/> 443 Housing/Accommodations | <input type="checkbox"/> 530 General | <input type="checkbox"/> 462 Naturalization Application | | <input type="checkbox"/> 895 Freedom of Information Act |
| <input type="checkbox"/> 240 Torts to Land | <input type="checkbox"/> 444 Welfare | <input type="checkbox"/> 535 Death Penalty | <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee | | <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice |
| <input type="checkbox"/> 245 Tort Product Liability | <input type="checkbox"/> 445 Amer. w/Disabilities - Employment | <input type="checkbox"/> 540 Mandamus & Other | <input type="checkbox"/> 465 Other Immigration Actions | | <input type="checkbox"/> 950 Constitutionality of State Statutes |
| <input type="checkbox"/> 290 All Other Real Property | <input type="checkbox"/> 446 Amer. w/Disabilities - Other | <input type="checkbox"/> 550 Civil Rights | | | |
| | <input type="checkbox"/> 440 Other Civil Rights | <input type="checkbox"/> 555 Prison Condition | | | |

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): F.L.S.A.

Brief description of cause: Failure to pay wages

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 500,000.00

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND☐ SAN JOSE

DATE

February 10, 2009

SIGNATURE OF ATTORNEY OF RECORD



MICHAEL D. BRUNO (SBN: 166805)
 MARCIE S. ISOM (SBN: 226906)
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Attorneys for Plaintiff
 BARRY GILBERT

FILED
 09 FEB 10 PM 12:12
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 159

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

BZ

BARRY GILBERT,

Plaintiff,

vs.

MDK MOTORSPORTS, LLC, a California Limited
 Liability Corporation; MARK KVAMME, an
 individual; DOES 1-20, inclusive,

Defendants.

CASE NO.

0595

**COMPLAINT FOR DAMAGES,
 AND DEMAND FOR JURY TRIAL**

- (1) Breach of Contract**
- (2) Breach of the Covenant of Good Faith and Fair Dealing**
- (3) Violations of California Labor Code**
- (4) Violations of Fair Labor Standards Act**
- (5) Penalties for Failure to Pay Wages**

The Plaintiff, BARRY GILBERT, alleges as follows:

NATURE OF COMPLAINT

1. This is a complaint by a former employee against his ex-employer for damages arising out of his employer's intentional failure to pay his wages as required by the California Labor Code, the Federal Fair Labor Standards Act, the California Wage Orders and Statutes, and his employment contract. Plaintiff is seeking compensatory damages for unpaid wages, liquidated damages, waiting time penalties under California Labor Code § 203, attorneys' fees and costs pursuant to Labor Code § 218.5, punitive damages, and pre-judgment interest.

Gordon & Rees LLP
 275 Battery Street, Suite 2000
 San Francisco, CA 94111

PARTIES

2. Plaintiff sues fictitious Defendants Does 1 through 20, inclusive, pursuant to Federal Rules of Civil Procedure Rules 4 and 15 because their true names and/or capacities (whether individual, corporate, associate, or otherwise), and/or facts showing them liable, are not presently known. Unless otherwise indicated, each Defendant is sued as the agent and acting with the full knowledge and consent of the other said co-defendants. Plaintiff will seek leave of the Court to amend this Complaint to show their true names and capacities when those have been ascertained. Plaintiff is informed and believes, and thereon alleges that each of these fictiously named Defendants is responsible in some manner for the occurrences herein alleged, and that the Plaintiff's injuries herein alleged were proximately caused by the aforementioned Defendants.

3. At all times herein mentioned Defendant, MDK MOTORSPORTS, LLC (hereinafter referred to as "MDK" or "Defendant"), which on information and belief is a California Limited Liability Corporation with its principal offices located at 888 2nd Avenue, Redwood City, California 94063, and has and is actively engaged in business from that location at all times during the Plaintiff's employment with the Defendant.

4. Plaintiff alleges upon information and belief that Defendant MARK KVAMME (hereinafter referred to as "KVAMME" or "Defendant") is, and at all relevant times was an individual residing in San Mateo County, California, an employee of Defendant MDK, and a managing agent and officer of MDK, as the term is defined in Civil Code § 3294. He personally directs MDK's business and himself directed that Plaintiff, who was MDK's CEO, not be paid the wages owed to him. Indeed, KVAMME acknowledged the debt, fraudulently promised to pay the owed wages and then directed that the wages not be paid. KVAMME had no intention of fulfilling this legal duty; he expressed to others that he simply would not pay Plaintiff's wages.

5. Plaintiff, BARRY GILBERT (hereinafter referred to as "Plaintiff"), was employed by MDK and by KVAMME, as a result of the control over MDK that he exercised, from August 27, 2007 through November 14, 2008, as MDK's Chief Executive Officer ("CEO"). At all relevant times, Plaintiff was a resident of Alameda County.

JURISDICTION AND VENUE

6. Jurisdiction of this action is based upon Fair Labor Standards Act, 28 U.S.C. § § 201, et. seq. and the pendant jurisdiction of this court. The amount in controversy exceeds \$75,000, exclusive of interest and costs.

7. Venue is proper in this Court because the Defendant is located in the County of San Mateo and the claim arose in the County of San Mateo.

GENERAL ALLEGATIONS

8. On August 19, 2007, MDK's Managing Member, KVAMME, sent Plaintiff an employment offer, which Plaintiff accepted.

9. On or about August 23, 2007, MDK and KVAMME hired Plaintiff to serve as its CEO. MDK paid Plaintiff an annual salary of \$200,000. MDK also granted Plaintiff an option, which Plaintiff exercised, to purchase 5% shares of MDK's Common Stock. Twenty-five percent of the option shares vested on August 27, 2008. The remaining shares were to vest in equal installments over the next 36 months.

10. Plaintiff's employment contract provides that if MDK terminates Plaintiff's employment for any reason other than "Cause" or "Permanent Disability" then Plaintiff will be entitled to the following: (a) payment of Plaintiff's base salary for a period of 24 months following the termination; (b) payment of Plaintiff's insurance coverage under COBRA; and (c) the vested percentage of the shares of the stock option will be determined by adding six months to the actual period of service Plaintiff completed with MDK.

11. On November 10, 2008, Defendants terminated Plaintiff's employment as part of a restructuring designed to save money. Plaintiff's employment was not terminated for cause or on account of disability. Indeed, KVAMME himself informed Plaintiff that Defendants were ending his employment in order to cut costs. At this time, KVAMME specifically told Plaintiff that he (KVAMME) would honor Plaintiff's severance agreement. Plaintiff's last day of employment was November 12, 2008. To date, KVAMME has refused to honor the agreement.

12. On December 17, 2008, Plaintiff sent KVAMME an email requesting that he honor the company's employment agreement and pay his severance. KVAMME never

1 responded to his request. Despite Plaintiff's numerous attempts to obtain his wages, Defendants
2 have refused to pay him.

3 **COUNT ONE**

4 *Breach of Contract*

5 13. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1-
6 12.

7 14. In August 2007, Plaintiff entered into a written employment agreement with
8 Defendants whereby Defendants agreed that if Defendants terminated Plaintiff's employment for
9 any reason other than "Cause" or "Permanent Disability," they would provide the following: (a)
10 payment of Plaintiff's base salary for a period of twenty-four (24) months following the
11 termination; (b) payment of Plaintiff's insurance coverage under COBRA; and (c) the vested
12 percentage of the shares of the stock option will be determined by adding six months to the
13 actual period of service Plaintiff completed with MDK.

14 15. Plaintiff duly performed all conditions, covenants and promises under the
15 agreement to be performed on his part. Plaintiff has at all times been ready, willing and able to
16 perform all of the conditions of the agreement to be performed by him.

17 16. As a result of the above-described conduct, Defendants breached their agreement
18 with Plaintiff by failing to pay Plaintiff the severance and other wages owed to him.

19 17. As a result of Defendants' breach of contract, Plaintiff has suffered and continues
20 to suffer damages, in the form of lost wages, lost interest, attorney fees and other employment
21 benefits, the exact amount of which will be proven at trial.

22 **COUNT TWO**

23 *Breach of the Covenant of Good Faith and Fair Dealing*

24 18. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1-
25 17.

26 19. Plaintiff and Defendants entered into an employment contract as set forth above.

27 20. Implied in the contract and in their employment relationship were covenants that
28 the parties would deal with each other honestly and in good faith and would not engage in

1 conduct to deprive the other of the benefits of the contract.

2 21. Defendants, however, have failed to perform their obligations in good faith and
3 fair dealing by failing to pay Plaintiff severance wages.

4 22. Defendants' conduct is intended to deprive and will deprive Plaintiff from the
5 benefits of the employment agreement.

6 23. As a result of Defendants' breach of the implied covenant of good faith and fair
7 dealing, Plaintiff has suffered and will continue to suffer monetary damages and irreparable and
8 imminent injury to his reputation.

9 COUNT THREE

10 *Failure to Pay Wages in Violation of the California Labor Code Section 201, et. seq.*

11 24. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1-
12 23.

13 25. At all relevant times, Plaintiff's employment was subject to California Labor
14 Code § 201 et. seq. and the applicable Wage Order promulgated by the California Industrial
15 Welfare Commission, which requires an employer who discharges an employee to immediately
16 pay all wages due.

17 26. Defendants willfully failed to pay Plaintiff the wages owed to him pursuant to his
18 employment contract at the conclusion of his employment, despite Plaintiff's repeated requests
19 to be paid.

20 27. By not paying Plaintiff the wages owed to him, Defendants violated Plaintiff's
21 rights under the law, specifically California Labor Code § 201, et. seq.

22 28. As a direct and proximate result of Defendants' failure to pay proper wages under
23 the California Wage Orders and California Labor Code, Plaintiff incurred general damages in the
24 form of lost wages in the amount presently believed to be by the Plaintiff to be in excess of
25 \$400,000.

26 29. Defendants are aware of the existence and requirements of the California Labor
27 Code and willfully, knowingly, and intentionally failed to pay Plaintiff the wages owed to him at
28 the time his employment ended.

30. Plaintiff was required to retain attorneys for the purpose of bringing this action and is entitled to an award of attorneys' fees and costs pursuant to California Labor Code § 218.5.

COUNT FOUR

Violation of the Fair Labor Standards Act

31. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1-30.

32. At all times relevant herein, Plaintiff's employment was subject to the provisions of the Fair Labor Standards Act of 1938, as amended (the "FLSA") and the Plaintiff was an individual employee covered by virtue of his direct engagement in interstate commerce.

33. Defendants willfully failed to pay Plaintiff the wages owed to him pursuant to his employment contract at the conclusion of his employment, despite Plaintiff's repeated requests to be paid.

34. By not paying Plaintiff the wages owed to him, Defendants violated Plaintiff's rights specifically protected by the FLSA.

35. As a direct and proximate result of Defendants' failure to pay proper wages under the FLSA, Plaintiff is entitled to liquidated damages and his wages, the combined amount of which presently is believed to be in excess of \$800,000.

36. Defendants intentionally, and with reckless disregard for their responsibilities under the FLSA, and without good cause, failed to pay Plaintiff wages owed to him and thus Defendants are liable to Plaintiff for liquidated damages in an amount, equal to Plaintiff's lost wages.

37. Plaintiff has been required to retain attorneys for the purpose of bringing this action and is entitled to an award of attorneys' fees and costs pursuant to Title 29 U.S.C. § 216(b) of the FLSA.

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COUNT FIVE

Penalty for Failure to Pay Wages at Termination – Labor Code § 203

38. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1-37.

39. At the time Defendants terminated Plaintiff's employment, Defendant owed Plaintiff an obligation to pay him more than \$400,000.

40. Failure to pay wages at an employee's termination subjects the employer to penalties provided in Labor Code § 203, up to 30 days of wages.

41. As of this date, wages have not been paid, thus making Defendants liable to Plaintiff for penalties for thirty (30) days' wages.

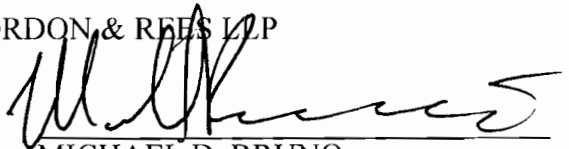
PRAYER FOR RELIEF

Wherefore, Plaintiff prays judgment against the Defendants and demands as follows:

1. For compensatory damages for unpaid wages in the amount, according to proof, of approximately \$400,000;
2. For liquidated damages;
3. For waiting time penalty damages of thirty days' wages, pursuant to California Labor Code § 203;
4. For attorneys' fees and costs pursuant to the California Labor Code and the FLSA;
5. For punitive damages;
6. For prejudgment interest;
7. For costs of suit herein;
8. For such other relief as the Court may deem appropriate.

Dated: February 9, 2009

GORDON & REES LLP

By: 
MICHAEL D. BRUNO
Attorney for Plaintiff
BARRY GILBERT